No. 90-1011 (2)

# In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS EDWARD NEVIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court violated petitioner's rights under the Confrontation Clause of the Sixth Amendment by prohibiting cross-examination of a government witness regarding the legal sufficiency of his guilty plea.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 21, 1990 (Pet. App. B1-B2). A petition for rehearing was denied on October 19, 1990. The petition for a writ of certiorari was filed on December 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of con-

spiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2, 4, 14-19); making false statements, in violation of 18 U.S.C. 1014 (Counts 9, 21, 25); misapplying bank funds, in violation of 18 U.S.C. 657 (Counts 10, 12, 28); bank fraud, in violation of 18 U.S.C. 1344 (Counts 26, 27, 31-33); and making false entries, in violation of 18 U.S.C. 1006 (Counts 29, 34-36). He was sentenced to two years' imprisonment and five years' probation, and he was ordered to pay restitution in the amount of $2 million dollars. The court of appeals affirmed. Pet. App. A1-A17.

1. The evidence is summarized in the companion case of *United States* v. *Brown*, 912 F.2d 1040, 1041 (9th Cir. 1990). Pet. App. A4. When State Federal Savings & Loan Association in Corvallis, Oregon, ran into financial difficulty, President Larry Waters and Vice President Brian Olsvik began an aggressive loan campaign to generate additional fee income for the bank. Petitioner was a businessman and a real estate developer who had a number of loans with State Federal at the time. Waters and Olsvik decided that their loan program would be enhanced by making additional loans to petitioner. However, State Federal was subject to a "loans to one borrower" regulation that limited the amount that could be loaned to any one person.[1] Petitioner had reached that limit.

From early 1984 through early 1985, Waters, Olsvik, and petitioner engaged in a series of maneuvers designed to conceal the fact that petitioner was the actual borrower of certain funds. This concealment was accomplished by the use of various nominees, and through schemes that directed the loan proceeds from one person to another. As a result of those maneuvers, the records of State Federal concealed the actual facts from State Federal itself, its regulators, and the

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[1] 12 C.F.R. 563.9-3 (1985) (recodified at 12 C.F.R. 563.93 (1990)).

Federal Savings and Loan Insurance Corporation. See *United States* v. *Brown*, 912 F.2d at 1041.

2. Indicted co-conspirator Jack Franks, who assisted petitioner in obtaining loans from State Federal, testified for the government at petitioner's trial. Counsel for petitioner sought to impeach Franks by attacking his motives and by attempting to demonstrate bias. Counsel explored the terms of Franks' plea agreement, which itself was introduced into evidence. Counsel elicited that Franks had pleaded guilty to devising a scheme to defraud State Federal and to obtain money by means of false representations. Counsel further elicited Franks' acknowledgement that, in return for the plea, the government agreed to dismiss 13 other counts in which Franks was charged, to dismiss the two counts of the indictment that had been brought against Franks' wife, to advise the sentencing court of Franks' cooperation, and to take no position on sentencing. Franks testified that, as part of the plea agreement, the government also allowed him to plead guilty in the District of Oregon to a bank fraud charge brought in the Northern District of Texas. Tr. 633-636, 642. Defense counsel further elicited that, before Franks was indicted, he did not think that he was committing any crimes, and that he did not intend to defraud State Federal. Tr. 636-637.[2]

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[2] Similarly, during cross-examination of government witnesses and co-conspirators Ronald Koos and Ronald Campbell, defense counsel fully explored the terms of their plea agreements with the government and their reasons for testifying. Tr. 258-264, 721-722, 724-725, 733-734. Defense counsel elicited from Koos that he had not believed at the time in question that he was doing anything illegal, and that the reason he had pleaded guilty was "to minimize [his] risk and get it over with," and "[to] balanc[e] the risk involved in going ahead with the case" (Tr. 253, 262, 264). Defense counsel elicited from Campbell that, at the time in question, he "[was not] intending to conspire with people to commit crimes against State Federal or the FSLIC" (Tr. 732).

In addition to eliciting the benefits Franks had obtained as a result of his guilty plea, defense counsel attempted to establish that Franks was not actually guilty of the offense to which he had pleaded guilty. Defense counsel elicited from Franks that Franks had pleaded guilty because he thought that the violation of the "loans to one borrower" rule was a criminal offense. When defense counsel stated that a violation of that rule is not a criminal offense, Franks responded: "Well, I feel maybe I shouldn't be here." Tr. 633. Franks further admitted that in a statement he had made in conjunction with his guilty plea, he had declared that "[i]t is my understanding that because [petitioner and his wife] were at their limit in borrowing capacity at [State Federal], that this is a violation of the law, and I have pleaded guilty to that offense." Tr. 634-635. In response to that testimony, defense counsel remarked: "Well, again, what you pleaded guilty to, Mr. Franks, is not a crime." Tr. 635.

On re-cross examination of Franks, defense counsel continued to suggest to Franks and to the jury that Franks' guilty plea to the State Federal charge was legally invalid. Tr. 655. The government objected on the ground that defense counsel was misleading the jury by "not referring to the entire record made at the time [Franks'] plea was entered." *Ibid.* The trial court sustained that objection, stating: "I think it's not relevant to this case in any event as to what he pleaded to. I took the plea. It was a valid plea, and that's the end of that. Now let's go on." *Ibid.*

Shortly thereafter, defense counsel moved for a mistrial on the ground that petitioner had been denied his right to confront witnesses against him. The court denied the motion, stating (Tr. 674-677):

> I permitted counsel to go into that very extensively until I felt it had gone too far. I felt that counsel unintentionally was misrepresenting a little bit the nature of

> the plea. The complications of this case don't allow a simple statement of what the nature of the plea was. I think, also, it was entirely appropriate for me to say that the plea was appropriate and that's particularly true after I had listened to this defendant describe the gyrations that went on.
>
> * * * I'm not going to preclude you from arguing that within reasonable limits, but I will stop you if there is an indication that the plea was improper or that the man was not guilty when he entered the plea. I did not permit that.
>
> * * * * *
>
> * * * The only time I stopped you was after you began to suggest that the plea was an invalid plea and the man should not have pleaded guilty. I'm not going to permit that. I will permit you to put the plea agreements in evidence, I will permit you to argue as to their conduct, but when you suggest that the plea was inappropriate and this man shouldn't be here * * * [a]nd when you made the statements about such as, for example, "Well, maybe you shouldn't be here," those kind [*sic*] of comments are inappropriate.

3. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A17. The court rejected petitioner's contention that the restriction on petitioner's cross-examination of Franks denied petitioner his Sixth Amendment right to confront the witnesses against him. The court found that the district court had given petitioner free rein to attack Franks' motives and to attempt to demonstrate bias, and that it had not attempted to shield Franks from examination or to bolster his credibility. Pet. App. A11, A13. All the district court had done was to preclude petitioner "from raising before the jury the purely legal issue of whether Franks' actual guilty plea was valid." *Id.* at A13. The court

of appeals upheld this "narrow restriction" (*id.* at A12) on petitioner's right of cross-examination, explaining:

> The fact that a witness should or should not have pled guilty is outside the point, and certainly did not tend to impeach that witness' testimony at trial. Even if one can spin some gossamer net that will pull the issue into focus, it would be so marginally relevant as to be properly excluded.

*Id.* at A13-A14.

The court also rejected petitioner's claim that he suffered substantial prejudice when the district court judge commented that he had taken Franks' plea and that it was a valid plea:

> The validity of the plea itself was outside the point in this case, and if counsel was insistent on going into its validity, that was a legal matter and he got a ruling on the law. Beyond that, the comment was fleeting, unemphasized, and unrepeated.

Pet. App. A14-A15.

## ARGUMENT

Petitioner renews his contention (Pet. 9-27) that the district court violated the Sixth Amendment by refusing to permit cross-examination of Franks regarding the validity of his guilty plea. The court of appeals properly rejected that contention.

1. The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him." That right entitles a defendant on cross-examination to probe the witness's motivation for testifying against the defendant. *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). But it does not entitle a defendant to conduct unlimited cross-

examination. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986); *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985). Instead, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

Here, the district court acted well within its discretion. The court imposed only a minor limitation on petitioner's ability to impeach Franks through inquiry into collateral matters. As the court of appeals noted (Pet. App. A11), the district court gave petitioner free rein to impeach Franks by attacking his motives and by attempting to demonstrate bias. That cross-examination and other evidence at trial fully illuminated Franks' motivation for testifying against petitioner. In addition, counsel for petitioner established that Franks believed that it was a crime to violate the federal lending limit regulation. The court stopped petitioner's counsel only when he sought to go even further afield by attempting to suggest that Franks' guilty plea was invalid. *Id.* at A12-A13. The purely legal issue of the validity of Franks' guilty plea was irrelevant to petitioner's culpability. See, *e.g.*, *Bridge* v. *Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988) (a co-defendant's conviction and sentence for an offense arising out of the same course of events is irrelevant to the question of the defendant's guilt).

Further cross-examination of Franks on that question would have accomplished nothing other than to mislead and confuse the jury. Despite defense counsel's attempts to suggest otherwise, Franks' guilty plea was legally valid. Franks pleaded guilty to Count 32 of the indictment, which charged that he and others "did devise a Scheme to defraud State Federal, examiners of the FHLB, and the FSLIC, and to obtain money, in the custody and control of State Federal,

by means of false and fraudulent pretenses, representations, and promises." C.A. Excerpt of Record 35. That count alleged that petitioner and others had caused State Federal to make a $2 million loan for the purported purpose of enabling petitioner's wife to buy an apartment complex. *Ibid.* The count further alleged that petitioner and others made the following misrepresentations to State Federal to secure the loan:

> a. that [the corporation formed to secure the loan], with [petitioner's wife] as authorized signator, was the true borrower, well knowing that [the corporation and petitioner's wife] were acting as a nominee for [petitioner] and Franks.
>
> b. that the loan proceeds were for acquisition of an apartment complex, well knowing that approximately $400,000 from the loan proceeds were diverted to Nevis Industries and to pay other [of petitioner's] loans.

C.A. Excerpt of Record 35-36.

On redirect examination, Franks testified that, when the proposal for the apartment complex loan was presented to State Federal, he knew that State Federal records would reflect petitioner's wife to be the owner of the complex. Tr. 653. Franks also knew the proposal was false in that respect, since petitioner in fact owned 75% of the complex. Tr. 653. Franks knew, as well, that the records would be false or incomplete in failing to reflect that a portion of the loan proceeds were to be used for purchase of a different property and for petitioner's personal use. Tr. 653. Finally, Franks admitted that his knowledge of the falsity of the representations made to State Federal formed the basis for his guilty plea. Tr. 654.

As the district court explained when defense counsel argued that Franks' plea was invalid because Franks did not

intend to defraud the United States (Tr. 855):

> [I]t's also a crime to attempt to execute or to execute a scheme or artifice to obtain any of the assets of the bank by means of a false or fraudulent pretense or statement.
>
> It is not necessary that * * * a person intend to cheat the United States government in order to be guilty of that offense, nor is it necessary that they intend a criminal act if they intend to devise a scheme to defraud a bank or to obtain any of the assets by false means.

Finally, the narrow limitation on petitioner's right of cross-examination did not prejudice petitioner. The court made clear to the jury that a violation of the lending limit regulation was not a criminal offense (Tr. 2060-2061):

> During the trial you've heard testimony concerning the federal lending limits rule. Whether or not defendants may have violated the federal lending rule is not sufficient to establish the crimes alleged in the indictment.
>
> The issue in this case is whether the defendants are guilty of violating certain federal criminal statutes. The issue is not whether any federal civil laws, such as the federal lending limit, were violated, nor whether the defendants were involved in any such violations, if they occurred. The testimony which you've heard about the federal lending limit rule may be considered only because it may be necessary to your understanding of the reasons or motives for the various loan transactions.

2. Petitioner's contention (Pet. 9-13) that the decision below conflicts with *United States* v. *Mayer*, 556 F.2d 245 (5th Cir. 1977), and *United States* v. *Marion*, 477 F.2d 330 (6th Cir. 1973), is without merit. The facts of *Mayer* and *Marion* bear no resemblance to the facts of the present case.

In *Mayer*, the trial court precluded cross-examination into either the motives of government witnesses for pleading guilty or the terms of their plea agreements. The trial court in *Mayer* instructed the jury that as a matter of law the pleas of the government witnesses had been entered voluntarily and without any expectation of judicial or prosecutorial lenience. Similarly, in *Marion*, the trial court curtailed questioning regarding any deals that the witness might have made with the government. In *Marion*, the trial judge told the jury he credited the cooperating witness's statement that no arrangement or deal with the government had induced him to testify. Here, by contrast, as the court of appeals properly found, "[t]he district court did not attempt to shield a witness from examination or try to bolster his credibility," but merely "preclude[d] [petitioner] from raising before the jury the purely legal issue of whether Franks' actual guilty plea was valid." Pet. App. A13.

Nor does the decision below conflict with this Court's decision in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), as petitioner claims (Pet. 14-18). In *Crane*, the trial court denied the defendant's pretrial motion to suppress his confession, finding that it was voluntary. At trial, the court excluded all testimony concerning the circumstances of the defendant's confession on the ground that the testimony pertained solely to the legal issue of voluntariness and was therefore inadmissible. This Court reversed, holding that the exclusion of the testimony concerning the circumstances of the confession violated the defendant's Sixth Amendment right to confront witnesses against him. The Court concluded that, because evidence of the circumstances under which a confession is made bears on its credibility and its voluntariness, the defendant had been deprived of his right to show that the confession was "insufficiently corroborated or otherwise . . . unworthy of belief." 476 U.S. at 689 (quoting *Lego* v. *Twomey*, 404 U.S. 477, 485-486 (1972)).

Here, by contrast, the district court did not foreclose inquiry into the details of Franks' plea agreement with the government, or the circumstances surrounding his decision to plead guilty. The court merely, and properly, limited inquiry into the legal sufficiency of Franks' plea.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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